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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 327.

MARY E. BARRETT, APPELLANT,

vs.

CHAS. D. FAILING AND XARIFA J. FAILING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED OCTOBER 4, 1881.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 In the Circuit Court of the United States for the District of Oregon. October Term, 1880.

Be it remembered that on the 23d day of March, 1880, there was duly filed in the circuit court of the United States for the di strict of Oregon a bill of complaint, in words and figures as follows, to wit:

2 *Bill of Complaint.*

In the Circuit Court of the United States for the District of Oregon.

MARY E. BARRETT, Complainant,

vs.

CHARLES FAILING AND XARIFA J. FAILING, Defendants.

To the judges of the circuit court of the United States for the district of Oregon:

Your orator, Mary E. Barrett, a resident of the State of California, brings this her bill against Charles Failing and Xarifa J. Failing, residents and citizens of the State of Oregon, and thereupon your orator complains and says:

That the defendants herein are husband and wife.

That on September 25th, 1866, your orator was, and for a long time prior thereto had been, the wife of one Charles Barrett, and was then a resident of the State of California.

That on or about said day your orator commenced a suit for a divorce against the said Charles Barrett in the district court of the State of California for the 15th judicial district, said court having jurisdiction thereof and authorized to grant divorces, accord-

3 ingly to and by virtue of the laws of that State.

That said Charles Barrett was duly served with process in said suit, and appeared and made defense thereto; and that afterwards, and on the 18th day of April, 1870, a decree was rendered and entered in said court in favor of your orator and against said Charles Barrett, dissolving the bonds of marriage existing between said Charles Barrett and your orator for and in consequence of the misconduct of said Charles Barrett, the defendant therein.

That at the time of the commencement of said suit for divorce the said Charles Barrett was not the owner of any real estate in the State of California, but was the owner in fee-simple of certain real estate in the State of Oregon, described as follows, to wit, the west half of lots seven (7) and eight (8), in block sixty-three (63), in the city of Portland, Multnomah county, State of Oregon, which

4 said real estate above described was and is of the value of two thousand ($2,000) dollars.

That on or about the 4th day of February, 1868, the said Charles Barrett, combining and confederating with Xarifa J. Barrett, now Xarifa J. Failing, and one of the defendants herein, who was the daughter of said Charles Barrett, and with intent to deprive this complainant of her just rights in and to said above-described property, and for the purpose of preventing the complainant from asserting her claim to or interest in said property, fraudulently made

a pretended deed of conveyance of said real estate to said Xarifa Jane, by the terms of which said deed the legal title to said property was vested in her.

That during all the times in this bill mentioned said Xarifa Jane was a resident in, and a citizen of, the State of Oregon, and was living with her said father, said Charles Barrett, and well knew of the pendency of said suit for divorce at the time of and prior to
5 said conveyance, and was familiar with and had full knowledge of all the facts and circumstances upon which said suit for divorce was based.

That said deed of conveyance was without any consideration or continued change of possession.

That at the time of the commencement of said suit for divorce your orator did not know that said Charles Barrett was the owner of the property described in this bill.

That said Charles Barrett died in the State of Oregon shortly after said decree of divorce was obtained.

That by the laws of the State of Oregon, and under and by virtue of said decree of divorce, your orator became and was entitled to one-third of the property hereinbefore described, the legal title to which was placed in the name of said Xarifa Jane, as above stated, and although in truth and in fact said Charles Barrett was the sole and absolute owner thereof, subject only to your orator's
6 rights therein.

And your orator further shows unto your honors that said Xarifa Jane Failing has been in the possession of all of said above-described property for the six years last past, and has received, collected, and enjoyed the rents profits and income from all of said property, no part of which has been paid to your orator.

That the value of the rents, profits, and income so derived and received from said property as foresaid for the said six years last past amounts to the sum of fifteen hundred dollars each year, one-third of which, to wit, $500 each year for said six years, belongs in equity to this complainant. The monthly rental is $125.

That said defendants refuse to account for or pay over any of said sum of money above described, or any part thereof, and they deny complainant's right to the same or any part thereof, all of which actings and doings are contrary to equity and good conscience,
7 and to the wrong and injury of your orator.

In consideration whereof, and forasmuch as your orator can only have adequate relief in this honorable court, where matters of this nature are properly cognizable and relievable, may it please your honors, at the final hearing of this suit, to order and decree this complainant to be the owner in fee simple of the undivided one-third of said lots seven (7) and eight (8), in block sixty-three (63), in the city of Portland, Multnomah county, and State of Oregon, and that these defendants hold the same in trust for your orator; and that the said defendants be required to make, execute, and deliver to your orator a good and sufficient deed of conveyance therefor; and that said defendants be decreed to account to and pay your orator one-third of all the rents, profits, and income received

by them from said property, and that when ascertained that
8 the same be declared to be a lien upon the defendants' portion of and interest in said property, and that the proper partition thereof be had; and that your orator have such other and further relief in the premises as to this court shall seem meet.

And may it please your honors to grant unto your orator the writ of subpœna of the United States of America, to be issued out of and under the seal of this honorable court, directed to the said defendants, Charles Failing and Xarifa J. Failing, commanding them and each of them, on a certain day to be therein named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree as may be made against them.

And your orator will ever pray, &c.

W. SCOTT BEEBE,
SIDNEY DELL, AND
O. P. MASON,
Complainant's Solicitors.

Original endorsed: Filed in office, this 23d day of March, 1880. R. H. Lamson, clerk.

9 And afterwards, to wit, on the 23d day of March, 1880, there was issued out of said court a subpœna *ad respondendum*, in words and figures as follows, to wit:

10 DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ, I have served the same upon the therein-named Charles Failing & Xarifa J. Failing, by exhibiting same to them, and by delivering to each of them, personally, a true copy thereof, duly certified to by me as U. S. marshal of said district, at Portland, in said district, on the 23d day of March, A. D. 1880.

ABNER W. WATERS, *U. S. Marshal.*
By WM. P. BURNS, *Deputy.*

11 I, Matthew P. Deady, judge of the United States district court for the district of Oregon, hereby authorize and instruct Abner W. Waters, or his deputy, W. P. Burns, to serve the within process.

Portland, Oregon, March 23, 1880.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

12 *Subpœna ad Respondendum.*

In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

MARY E. BARRETT, Complainant,
vs.
CHARLES FAILING and XARIFA J. FAILING, Defendants. } In Equity. No. 634.

The President of the United States of America to Charles Failing and Xarifa J. Failing, Greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of May next, which will be the third day of May, A. D. 1880, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein Mary E. Barrett is complainant and you are defendants, and further to do and receive what our said circuit court shall consider in this behalf: and this you are in no wise to omit, under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your deputy, to make due service of this our writ of subpœna, and to have then and there the same.

Hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, affixed at Portland, in said district, this 23d day of March, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

[SEAL.] R. H. LAMSON, *Clerk.*

Memorandum pursuant to equity rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable: otherwise the complainant's bill therein may be taken *pro confesso.*

12½ Endorsed: No. 634. In the circuit court of the United States for the ninth judicial circuit, district of Oregon. In equity. Mary E. Barrett *vs.* Charles Failing & Xarifa J. Failing. *Subpœna ad respondendum.* Returned and filed, March 24, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

13 And afterwards, to wit, on the 15th day of June, 1880, there was duly filed in said court a demurrer to the bill of complaint, in words and figures as follows, to wit:

14 *Demurrer to Bill.*

In the Circuit Court of the United States for the District of Oregon

MARY E. BARRETT, Complainant,

vs.

CHARLES D. FAILING and XARIFA J. FAILING, Defendants.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and, for cause of demurrer, show:

That the said complainant hath not, in and by her said bill, made or stated such a case as doth or ought to entitle her to any such discovery or relief, as is thereby sought and prayed for, from and against these defendants.

Whereupon these defendants respectively demand the judgment of this honorable court, whether they shall be compelled to
15 make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed.

WM. STRONG,
F. R. STRONG, &
T. N. STRONG,
Solicitors for Defendants.

DISTRICT OF OREGON, *ss:*

I, William Strong, of counsel for the defendants in the above-entitled cause, do hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

WM. STRONG,
Of Counsel for Defendants.

DISTRICT OF OREGON, *ss:*

I, Xarifa J. Failing, one of the defendants in the above-entitled cause, being solemnly sworn, depose and say that the foregoing demurrer is not interposed for delay.

XARIFA J. FAILING.

Subscribed and sworn to, this 15th day of June, 1880, before me.
[SEAL.] F. R. STRONG,
Notary Public.

16 Original endorsed: Filed June 15, 1880. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

18 And afterwards, to wit, on the 27th day of June, 1880, there was duly filed in said court an opinion by Judge Deady, in words and figures as follows, to wit:

Opinion by Judge Deady.

[The Daily Oregonian. Tuesday Morning, July 1, 1880.]

Decision in the U. S. Circuit Court. Deady, J.

U. S. Circuit Court, District of Oregon.

MARY E. BARRETT
v.
XARIFA J. FAILING, CHARLES D. FAILING. } No. 634. Suit in Equity.

MONDAY, *June* 27, 1880.

1. CODE OF PROCEDURE.—A provision in a code of procedure giving the husband or wife "in all cases" a certain interest in the lands of the other, as an incident to and consequent upon a decree of divorce being given at the suit of either, is not to be construed as a general statute regulating the right of the husband and wife in the lands of each other generally, and in any event, but as confined to those cases in which such decree is given under such code of procedure, and in the courts of the State.
2. DECREE OF DIVORCE.—§ 495 of the Or. Code of Civil Procedure provides that "in all cases" of divorce the prevailing party shall be entitled to one-third of the lands then owned by the other. *Held*, that the right is conferred by the statute, and results wholly from the entry of the decree of divorce and not from any provision in it to that effect, but that it does not include or affect a decree of divorce given in another State or country.

DEADY, J.:

This suit is brought to establish the right of the plaintiff to the undivided one-third of the west half of lots 7 and 8, in block 63, in the town of Portland, the same being of the value of $2,000, and for an account of the rents and profits thereof during the past six years. It appears from the bill that on September 25, 1866, the plaintiff, then a resident and citizen of California, commenced a suit in a court of that State to obtain a divorce from her husband, Charles Barrett, then a resident and citizen of Oregon, and on April 1, 1870, obtained a decree therein dissolving the bonds of marriage between herself and husband; that at the date of the commencement of said suit said Barrett was the owner of the premises aforesaid, and that on or about February 4, 1868, he conveyed said premises to his daughter, the defendant, Xarifa J. Failing, with intent to prevent the plaintiff from acquiring any right in the premises by said decree; that at the commencemant of said suit for divorce the plaintiff did not know that said Barrett was the owner of said premises, and that he died shortly after the decree of divorce was obtained; that said Xarifa has been in the possession of said premises for the past six years, and received the rents and profits thereof, amounting to $500 per annum.

Upon these facts the plaintiff claims that by the laws of Oregon,

and by virtue of the decree aforesaid, she became and was entitled to one-third of the premises.

This claim is made under § 495 of the Or. Code of Civil Procedure, which provides that—

"Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall, in all cases, be entitled to the undivided one-third part in his or her individual right in fee of the whole of the real estate owned by the other, at the time of such decree, in addition to the further decree for maintenance provided for in § 497; and it shall be the duty of the court, in all such cases, to enter a decree in accordance with this provision."

As it originally stood in the code, this section simply provided that upon the dissolution of a marriage the real property of the parties should be discharged from any claim or interest of the other therein; provided, if the marriage was dissolved on account of the adultery or conviction of a felony of either party, then the innocent party should be entitled as tenant in dower or by the curtesy, as the case might be in the real property of the other, the same as if that other were dead. The statute declared this to be legal effect and operation of the decree, and it was neither necessary nor proper that the pleadings or decree should allege or contain anything on the subject. The section was amended as it now stands on December 20, 1865, and the purpose of it is manifest—it is to give the prevailing and so far innocent party in the suit, *in all cases*, no matter what the cause of divorce, absolutely one-third of the other's real property, as a result and effect of the decree dissolving the marriage, instead of mere dower or curtesy in certain cases.

But by adding the clauses to the amended section requiring the court to make provision in the decree concerning this third, the matter is unnecessarily complicated, and some doubt is raised as to what is the effect of the decree where no such provision is contained in it.

In Bamford *v.* Bamford, 4 Or., 30, it was held that where the complaint and decree in a suit for divorce are silent as to the property of the defendant, the party obtaining the divorce acquires no right in the property of the other. And this conclusion seems to rest mainly upon the assumption that it is necessary to the security and certainty of titles, that a description of the land to be affected by the decree should be contained in it, and therefore the Legislature is presumed to have intended that it should be done.

But nothing is gained in this respect, by attempting to specify the lands to be affected by the decree. For if you undertake to describe them there is the chance of mistake or omission, while if nothing is said the decree affects *all* the lands of the party in fault with the certainty of the lien of a docketed judgment. As well object to the lien of a judgment, because the property affected by it is not described in it, and depends upon the extrinsic fact of the ownership of the judgment debtor, or the operation of a will by which the testator devises and passes the title of all the property owned

by him in the State of Oregon, without naming or describing any particular parcel of it.

Besides there may be a question as to what property does belong to the party against whom the decree is obtained, and, in such case, third persons would be necessary parties to its final determination. But it is neither proper nor convenient that such questions should be litigated in the suit for divorce, or that third persons should be thus made parties to a controversy between the husband and wife in which they have no interest.

In the subsequent case of Wetmore *v.* Wetmore, 5 Or., 469, the court went further towards sustaining the statute, and held that it was peremptory as to the right of the party obtaining the divorse in the land of the other, and also the duty of the court to make the decree accordingly; but did not decide what effect, if any, the omission to provide for the matter in the decree would have upon such right.

However, in my judgment, the amended section, like the original one, gives the right upon the entry of the decree without any mention of its being made therein, and that the clause in the former, concerning the nature of the decree to be entered, is, so far as this matter is concerned, merely cumulative; and that in no event need there be any allegation or proof concerning the lands to be affected by the decree, but only, if there is a decree for a divorce, that it shall contain a provision to the effect that the party obtaining it is thereupon and thereby entitled to one-third of the real property then owned by the other, whatever it may be.

If any question should arise as to what property was so owned by such other, it can, as it should be, determined by appropriate proceedings between the parties interested.

If, then, the decree of divorce in Barrett *v.* Barrett had been pronounced by a court of this State, in a proceeding under Title VII of its code of civil procedure, concerning "suits to declare void or dissolve the marriage contract," I should have no hesitancy in holding that this suit could be maintained, unless the ruling in Bamford *v.* Bamford, *supra*, should prevent me.

But counsel for the plaintiff go further, as they must, to maintain this bill, and contend that the right conferred by said § 495 on the prevailing party in the lands of the other is given to such party, not only by the mere operation of the statute and as a *result* of the decree and not *by* it, but *in all cases* of divorce, whether obtained in the courts of this State, under its code of procedure, or elsewhere—that the declaration in said § 495—

"*Whenever* a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall, *in all cases*, be entitled to the undivided one-third part * * * of the whole of the real estate owned by the other at the time of such decree"—is a general rule of universal application, like the provision in the statute of descents, declaring that *whenever* any person shall die intestate and seized of real property it shall descend to certain persons, or that of dower, which declares that the widow of *every* deceased person shall be entitled to dower in the inheritance of her

husband, and cite Harding *et ux. v.* Alden, 9 Maine, 140; DeGodey *v.* Godey, 39 Cal., 161; and Whetstone *v.* Coffee, 48 Texas, 269.

19 In Texas and California the civil law is so far in force that property acquired during the marriage, otherwise than by gift, devise, or descent, is common property; that is, it belongs to the matrimonial community, the husband and wife, equally, subject to the right of management on the part of the husband during coverture. The cases cited from these States only decide that when a decree of divorce is declared and no disposition is made of the community property, the wife may assert her right to her interest in it in another suit before another court of the same State; and this, although the statute of the latter State, provided that in case of the dissolution of the marriage by the decree of the court, "the common property shall be equally divided between the parties, and *the court granting the decree* shall make such order for the division of the common property."

But the question whether a decree of divorce obtained in another State—a foreign decree—comes within the operation of this § 495, so as to affect the title to lands in this State, these cases do not decide.

The case in 9 Maine goes further, and holds that under the law of that State, which provided generally, that when a divorce was decree for the adultery of the husband, the wife should be entitled to dower the same as if he were dead, a wife divorced in Rhode Island for the adultery of the husband committed in North Carolina, was entitled to dower in his lands in Maine. The contest in the case was principally as to the validity of the Rhode Island divorce assuming that to have been valid, her right to dower was allowed without much consideration—the court being apparently controlled by the fact that the provision was general "and not limited to divorces decreed within the State."

And so the question of what was the legislative intent in the case of the Oregon statute must be determined mainly upon its own language and circumstances. In this connection weight must be given to the fact that said § 495 occurs in a code of procedure, and in that division of it which authorizes and regulates the granting of divorces in and by the courts of the State only, and not in a general statute defining or prescribing the rights of husband and wife, as such, in the lands or property of each other.

Although, then, the statute does say that the prevailing party shall "be entitled" "in *all* cases" to a third of the others land, yet the question arises in what *all cases?* Is it *all* the cases of divorce brought and determined under this code in the courts of Oregon and for the causes therein prescribed and allowed, or does the phrase include *all* the cases decided under any code in any country and for any cause?

In my judgment the statute only comprehends *all the cases* provided for in it which may be said to arise, or at least determined under it, and in the courts whose procedure is regulated by it. By the code (§ 266), a judgment "in *any* action" is authorized to be docketed, whereupon it becomes a lien upon the property of the judgment debtor on the county. The phrase *any action* is quite as

comprehensive as *all actions*. But can it be supposed for a moment that, under the circumstances, it includes a judgment given in any other State or country, or that any judgment was in the contemplation of the Legislature, other than those authorized and provided for in the code in which the provision occurs?

It may be admitted that the Legislature has the power to provide that a decree of divorce, pronounced in the courts of another State, shall have the same effect upon the real estate property of the parties in this State, as if given here, or that a judgment given in a foreign forum might be docketed here with the same effect as if given in the courts of the State.

But it is not to be inferred that the Legislature intended to make any such extraordinary provisions from the bare use of language which is fairly satisfied when confined to domestic decrees and judgments, and only occurs in a code of procedure made to regulate judicial proceedings in the courts of the State. The results which would follow from allowing a decree of divorce in another State to have the same effect upon the property of either within this State, as if given here, are sufficiently serious to prevent such a conclusion, unless the statute was plain and peremptory to that effect.

Divorces may be and are allowed in other States and countries for causes and under circumstances not allowed here, and contrary to the public policy and morals of the State. But if § 495 is taken absolutely and construed to include all cases of a decree for divorce given as well without the State as within it, then such divorces, although granted contrary to the laws and policy of this State, would, nevertheless, be allowed an extra territorial force and effect within it, and often, as in this case, against the property of its own citizens.

Aid is sought to be given to the claim of the plaintiff by invoking the rule prescribed in Article IV of the National Constitution and the act of Congress passed in pursuance thereof, of May 26, 1790, (1 Stat., 122,) which, in effect, declares that the judgments of each State shall have the same credit and effect in every other State that they have in the State where they were given.

But it is admitted that the decree of the California court is valid and effectual here as a decree of divorce, and that is all the effect it has in that State. The law of California, unlike that of this State, does not provide that a decree of divorce shall work a transfer or forfeiture of one-third of the real property of the one party to the other, and if it did, it could have have no extra territorial effect, but would be confined in its operation to the property of the parties within that State.

The plaintiff's decree of divorce, although valid and effectual, as such can have no operation or effect upon real property in this State, except with its consent declared in its laws. If this decree was within the purview of the provision in § 495, I think this suit could be maintained. But, in my judgment, that not being the case, the demurrer to the bill must be sustained; and it is so ordered.

Sidney Dell and W. Scott Bebee, for the plaintiff.
William Strong, for the defendant.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Or.

Endorsed as follows: Filed June 27, 1880. R. H. Lamson, clerk.

20 And afterwards, to wit, on Monday, the 28th day of June, 1880, the same being the 42d judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

21 *Order Sustaining Demurrer.*

In the Circuit Court of the United States for the District of Oregon.

MARY E. BARRETT
vs.
CHARLES FAILING and XARIFA J. FAILING. } No. 634. June 28, 1880.

This cause having been heretofore heard on the demurrer filed to the bill herein, and argued by Mr. W. S. Beebe and Mr. Sidney Dell, of counsel for complainant, and by Mr. William Strong, of counsel for defendants, and taken under advisement by the court, and now, at this day, the court being fully advised in the premises, it is ordered and adjudged that said demurrer be, and the same is hereby, sustained; and it is further ordered that said complainant have thirty days in which to apply for a rehearing, or for leave to plead further in this cause.

(Signed) DEADY, *J.*

22 And afterwards, to wit, on Monday, the 2d day of May, 1881, the same being the 12th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

23 *Order Sustaining Demurrer on Rehearing.*

In the Circuit Court of the United States for the District of Oregon.

MARY E. BARRETT
vs.
CHARLES FAILING *et al.* } No. 634. May 2d, 1881.

This cause having been heretofore argued upon a rehearing on the demurrer to the bill herein, and taken under advisement by the court; and now, at this day, the parties appearing, the complainant, by Mr. W. S. Beebe, of counsel, and the defendants, by Mr. William Strong, of counsel; and the court being now fully advised in the premises, and it appearing to the court that there is no equity in the bill, it is adjudged and decreed that said demurrer be, and the same is hereby, sustained; and thereupon, on motion of said complainant, it is further ordered that said complainant be allowed ten

days in which to move for leave to amend said bill of complaint, upon ten days' notice to the adverse party.

(Signed) DEADY, *J.*

24 And afterwards, to wit, on the 7th day of May, 1881, there was duly filed in said court a motion for leave to amend bill of complaint, and for leave to file the same, in words and figures as follows, to wit:

25 *Motion for Leave to Amend.*

In the Circuit Court of the United States for the District of Oregon.

MARY E. BARRETT, Compl't,
vs.
XARIFA J. FAILING & CHAS. D. FAILING, Def'ts.

Now comes the above-named complainant, and moves the court for leave to amend her bill of complaint, and for leave to file the same.

May 7, 1881. SIDNEY DELL &
W. S. BEEBE,
Complainant's Solicitors.

Original endorsed: Filed May 7, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

26 And afterwards, to wit, on Monday, the 16th day of May, 1881, the same being the 18th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

27 *Order Allowing Motion for Leave to Amend Bill.*

In the Circuit Court of the United States for the District of Oregon.

MARY E. BARRETT
vs.
CHARLES FAILING *et al.* } No. 634. May 16, 1881.

Now, at this day, comes the complainant in the above-entitled cause, by Mr. W. S. Beebe and Mr. Sidney Dell, of counsel, and the defendants, by Mr. William Strong, of counsel, and this cause comes on to be heard on the motion of said complainant for leave to amend the bill herein, and the court having heard the argument of counsel, and duly considered the same, it is ordered that said motion be, and the same is hereby, allowed, upon complainant paying to said defendants the sum of twenty dollars costs. And it is further ordered that said defendants have till rule day in June next to demur to said amended bill, or until the rule day in July to answer the same.

(Signed) DEADY, *J.*

28 And afterwards, to wit, on the 18th day of May, 1881, there was duly filed in said court an amended bill of complaint, in words and figures as follows, to wit:

29 *Amended Bill.*

In the Circuit Court of the United States for the District of Oregon.

MARY E. BARRETT, Complainant,

vs.

CHARLES D. FAILING and XARIFA J. FAILING, Defendants.

To the judges of the circuit court of the United States for the district of Oregon:

Upon leave of the court, first had and obtained, your orator, Mary E. Barrett, a resident and citizen of California, amends this her bill against Charles D. Failing and Xarifa J. Failing, residents and citizens of the State of Oregon, and thereupon your orator complains and says:

That the defendants herein are husband and wife; that on September 25th, 1866, your orator was, and for more than two years prior thereto had been, the wife of one Charles Barrett, and
30 was then a resident and citizen of the State of California; that on or about said day your orator commenced a suit for divorce against the said Charles Barrett in the district court of the State of California for the 15th judicial district, said court having jurisdiction thereof, and authorized to grant divorces according to, and by virtue of, the laws of that State; said Charles Barrett was duly served with process in said suit, and appeared and made defense thereto; and that afterwards, and on the 18th day of April, 1870, your orator being still a citizen of said State, a decree was, in said suit, rendered and entered by said court in favor of your orator and against said Charles Barrett, dissolving the bonds of marriage existing between said Charles Barrett and your orator, at the prayer of your orator for, and in consequence of, the misconduct of said Charles Barrett, the defendant therein.

31 That at the time of the commencement of said suit for divorce the said Charles Barrett was not the owner of any real estate in the State of California, but was the owner in fee-simple of certain real estate in the State of Oregon, described as follows, to wit, the west half of lots seven (7) and eight (8), in block sixty-three (63), in the city of Portland, in the southeast corner of Fifth and Washington street, all in the county of Multnomah, State of Oregon; which said real estate above described was and is of the value of two thousand dollars for the undivided one-third part thereof.

That on or about the 4th day of February, 1868, the said Charles Barrett, combining and confederating with Xarifa J. Barrett, now Xarifa J. Failing, and one of the defendants herein, who was the daughter of said Charles Barrett, and with intent to deprive this complainant of her just rights in and to said above described property, and for the purpose of preventing this complainant from asserting her claim to or interest in said property, fraudulently
32 made a pretended deed of conveyance of said real estate to said Xarifa Jane, by the terms of which said deed the legal title to said property was vested in her.

That during all the times in this bill mentioned said Xarifa Jane

was a resident in and citizen of the State of Oregon, and was living with her said father, and well knew of the pendency of said suit for divorce at the time of and prior to said conveyance, and was familiar with and had full knowledge of all the facts and circumstances upon which said suit for divorce was based. The said deed of conveyance was without consideration, and was not followed by any immediate or continued change of possession; that at the time of the commencement of said suit for divorce, your orator did not know that said Charles Barrett was the owner of the real estate described in this bill; that said Charles Barrett died in the State of Oregon in July, 1870, shortly after said decree of divorce was obtained; that by the laws of the State of Oregon, and under and by virtue of the said decree of divorce, and as the effect thereof, your orator became and was entitled to one-third of the property hereinbefore described, the legal title to which was placed in the name of said Xarifa Jane as above stated, although in truth and in fact said Charles Barrett was the sole and absolute owner thereof, subject only to your orator's rights therein.

And your orator further shows that said Xarifa Jane Failing has been in the possession of all of said above-described property for the ten years last past, and has received, collected, and enjoyed the rents, profits, and income from all of said property, including your orator's one-third part thereof, no part of which has been paid unto your orator.

That the value of the rents, profits, and income so derived and received from said property as aforesaid for the said ten years last past has been fifteen hundred dollars for each year, one-third of which, that is to say, five hundred dollars per year, with interest thereon from the end of each year at ten per cent. per annum for said ten years, belongs, in equity, to this complainant; and that the accruing monthly rental from said property is one hundred and twenty-five dollars ($125) net each month.

That said defendants refuse to account for or pay over any of said sum of money above described, or any part thereof, and they deny complainant's right to the same or any part thereof, all of which actions and doings are contrary to equity and good conscience, and to the wrong and injury to your orator.

In consideration whereof, and forasmuch as your orator can only have adequate relief in this honorable court, where matters of this nature are properly cognizable and relievable, may it please your honors, at the final hearing of this suit, to order and decree this complainant to be the owner in fee simple of the undivided one-third of the west half of said lots seven (7) and eight (8), in block sixty-three (63), on the southeast corner of Fifth and Washington streets aforesaid, in the city of Portland, county of Multnomah, and State of Oregon, and that these defendants are the holders of the same in trust for your orator; and that the said defendants be required to make, execute, and deliver to your orator a good and sufficient deed of conveyance therefor, and that said defendants be decreed to account with and pay to your orator one-third of all the accrued and accruing rents,

profits, and income received by them as aforesaid from said property, with lawful interest thereon; and that, when ascertained, the same be declared to be a lien upon the defendants' portion of said interest in said real estate, and that the proper partition thereof be had, and that your orator have such other or further relief in the premises as to the court shall seem meet.

36 And may it please your honors to grant unto your orator the writ of subpœna of the United States of America, to be issued out of and under the seal of this honorable court, directed to the said defendants, Charles D. Failing and Xarifa J. Failing, commanding them, and each of them, on a certain day, to be named therein, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree as may be made a against them.

And your orator will ever pray.

W. SCOTT BEEBE,
SIDNEY DELL,
Complainant's Solicitors.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

Receipt of twenty dollars for costs of leave to file, and notice of the filing of the within amended bill of complaint is hereby acknowledged, this May 18, 1881.

WM. STRONG & SONS,
Solicitors for Defendants.

37 Endorsed as follows: Filed in office, this 18th day of May, A. D. 1881. R. H. Lamson, clerk.

38 And afterwards, to wit, on the 6th day of June, 1881, there was duly filed in said court a demurrer to amended bill, in words and figures as follows, to wit:

39 *Demurrer to Amended Bill.*

In the Circuit Court of the United States for the District of Oregon.

MARY E. BARRETT, Complainant,
vs.
CHARLES D. FAILING and XARIFA J. FAILING, Defendants. } In Equity.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in complainant's amended bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

That said complainant hath not, in and by her said amended bill, made or stated such a case as doth or ought to entitle her to such discovery or relief as is thereby sought and prayed for, from, and against these defendants, or either of them.

40 Wherefore these defendants respectively demand the judgment of this honorable court whether they shall be compelled to make any further answer to the said amended bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

WM. STRONG,
F. R. STRONG &
T. N. STRONG,
Solicitors for Defendants.

DISTRICT OF OREGON, *ss:*

I, William Strong, solicitor and of counsel for the defendants, do hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

Portland, June 6th, 1881.

WM. STRONG,
Solicitor & of Counsel for Defendants.

DISTRICT OF OREGON, *ss:*

I, Xarifa J. Failing, one of the defendants in the above-entitled cause, being solemly sworn, do depose and say that the fore-
41 going demurrer therein is not interposed for delay.

XARIFA J. FAILING.

Subscribed and sworn to, this 6th day of June, 1881, before me.

R. H. LAMSON, *Clerk.*

Endorsed as follows: Filed June 6, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

42 And afterwards, to wit, on Wednesday, the 17th day of August, 1881, the same being the 67th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

43 *Order Sustaining Demurrer to Amended Bill & Decree.*

In the Circuit Court of the United States for the District of Oregon.

MARY E. BARRETT
vs.
CHARLES D. FAILING and XARIFA J. FAILING. } No. 634.

AUGUST 17, 1881.

Now, at this day, comes the complainant, by Mr. Sidney Dell and Mr. W. Scott Beebe, of counsel, and the defendants, by Mr. William Strong, of counsel, and by agreement of the parties this cause comes on to be heard on the demurrer to the amended bill herein, and the court having heard the argument of counsel, and being fully advised in the premises, it is ordered that said demurrer be, and the same is, hereby sustained; and it appearing to the court that there is no equity in the bill herein, it is thereupon adjudged and decreed that said bill be, and the same is hereby, dismissed; and it is fur-

ther adjudged and decreed that the plaintiff pay the defend-
44 ants the costs and expenses by them in this behalf sustained, to be taxed, and that they have execution therefor. Thereupon, on motion of complainant, it is ordered that an appeal be allowed from this decree to the Supreme Court of the United States, and that the bond for said appeal, now produced in court, in the sum of two hundred dollars, with Charles Gardner, as surety therein, be, and the same is hereby, approved.

(Signed) DEADY, *J.*

45 And afterwards, to wit, on the 17th day of August, 1881, there was duly filed in said court a motion for allowance of appeal, in words and figures as follows, to wit:

46 *Motion for Allowance of Appeal.*

In the Circuit Court of the United States for the District of Oregon.

MARY E. BARRETT, Complainant,

vs.

CHARLES D. FAILING and XARIFA J. FAILING, Defendants.

And now, at this [day], comes the above-named complainant, Mary E. Barrett, and claims an appeal from the final decree of the said court in the above-entitled suit, and herewith offering her undertaking for appeal in the sum of two hundred dollars, with Charles Gardner as surety thereon, and moves the court for an allowance of her said appeal to the Supreme Court of the United States in said cause, and for an approval of said undertaking and surety.

W. SCOTT BEEBE &
SIDNEY DELL,
Compl't's Solicitors.

47 Endorsed as follows: Filed in office, this August 17, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

48 And afterwards, to wit, on the 17th day of August, 1881, there was duly filed in said court an undertaking on appeal to the Supreme Court of the United States, in words and figures as follows, to wit:

49 *Undertaking on Appeal.*

In the Supreme Court of the United States.

MARY E. BARRETT, Complainant & Appellant,

versus

CHARLES D. FAILING and XARIFA J. FAILING, Defendants & Respondents.

Know all men by these presents, that we, Mary E. Barrett and Charles Gardner, surety, are held and firmly bound unto Charles D. Failing and Xarifa J. Failing, of Portland, Oregon, in the sum of two hundred dollars, to be paid to the said Charles D. Failing and Xarifa J. Failing, their executors and administrators, to which

payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, by these presents.

Sealed with our seals. Dated this August 17th, 1881.

Whereas the above-named Mary E. Barrett hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the
50 United States for the district of Oregon:

Now, therefore, the condition of this obligation is such, that if the above-named Mary E. Barrett shall prosecute her said appeal to effect, and answer all cost if she shall fail to make good her plea and complaint, then this obligation shall be void; otherwise, to remain in full force and virtue.

MARY E. BARRETT. [SEAL.]
CHARLES GARDNER. [SEAL.]

Sealed and delivered in presence of—

———.

UNITED STATES OF AMERICA, }
District of Oregon, } *ss:*

I, Charles Gardner, being first duly sworn, say that I am the surety named in the foregoing undertaking; that I am a freeholder and resident in the county of Multnomah, State and district of Oregon, and that I am worth the sum of four hundred dollars over and above all debts, liabilities, and property exempt from execution.

CHARLES GARDNER.

51 Sworn to and subscribed before me, this August 17th, 1881.

R. H. LAMSON, *Clerk.*
By P. LEONARD, *Deputy Clerk.*

Endorsed as follows: Filed in office, this August 17, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

52 And afterwards, to wit, on the 17th day of August, 1881, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit:

53 *P[ti]tion for Appeal.*

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA, *ss.*

MARY E. BARRETT, Complainant & Appellant,
versus
CHARLES D. FAILING and XARIFA J. FAILING, Defendant & Respondents.

To the Supreme Court of the United States:

The petition of Mary E. Barrett respectfully shows, that on the — day of ——, 1880, she filed her bill in equity against the above-named defendants in the circuit court of the United States for the district of Oregon, a court having jurisdiction over the parties, alleging that a decree had been made against one Charles Barrett

by the district court of the State of California for the 15th judicial district, a court having jurisdiction of the persons and subject-matter, as therein alleged, dissolving the marriage theretofore ex-
54 isting between her and the said Charles Barrett, and that at the date of the said decree he was the owner of certain real estate therein described, which he had fraudulently conveyed to said Xarifa J. Failing, in fraud of petitioner's rights, while said petition for divorce was pending, and praying a decree that your petitioner was the owner of the undivided one-third part, in her individual right, from the date of said decree, of all of said real estate; and *and* that said defendants held the same in trust for your petitioner, and for an accounting and partition of said real estate; to which said complaint the said defendants filed a demurrer, which was sustained, and complainant was allowed to file an amended bill of complaint, which said amended bill your petitioner duly filed on the — day of ——, 1881, pursuant to the leave of the court, alleging, as in the original bill, and, among other things, further alleging that complainant was a citizen of the State of California
55 at the date of said decree of divorce, and now is such citizen; and that her said one-third of the real estate described was and is of the value of two thousand dollars, and that her share of the rents, unlawfully detained by defendants, was more than five thousand dollars, as therein set forth.

To which amended bill of complaint defendants duly demurred, and the said demurrer was this day fully sustained by the said circuit court for want of equity in the bill, and a decree was thereupon rendered and entered dismissing the same with costs against the petitioner.

Wherefore your petitioner complains of said order sustaining said demurrer, and of said decree dismissing said bill, as erroneous, and prays that the proceedings and decree may be brought before the Supreme Court and the said decree reversed.

M. E. BARRETT.

SIDNEY DELL &
W. SCOTT BEEBE,
Counsel for Mary E. Barrett.

56 Endorsed as follows: Filed in the clerk's office of the circuit court of the United States for the district of Oregon, this 17th day of August, 1881. R. H. Lamson, clerk. By P. Leonard, deputy clerk.

Clerk's Certificate.

THE UNITED STATES OF AMERICA, }
District of Oregon, } ss.:

I, R. H. Lamson, clerk of the United States circuit court for the district of Oregon, do hereby certify that the foregoing copy of the final record, and of the proceedings in said suit, and of the opinion delivered by the court in said cause, has been by me compared with the original, and that it is a correct transcript therefrom, and of the